



Mediation as a Method of Dispute Resolution

An Overview of the Mediation Process

Kerry Newcomer
P. Mars Scott Law Offices
2920 Garfield, Suite 200
P.O. Box 5988
Missoula, Montana 59806

(406) 327-0600
kerry.newcomer@pmarsscott.com



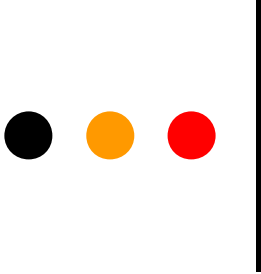
Characteristics of Mediation

- Private
- Confidential
- Informal
- Voluntary
- The participants determine the outcome



The Mediator

- Is impartial and neutral
- Does not have authority to compel an outcome or decide any issue
- Assists the participants by
 - Facilitating the exchange of information
 - Helping to clarify the issues and the participants' interests in the outcome
 - Ensuring that important information is disclosed



“Mediation” may refer to fundamentally different dispute resolution processes

- Alternative dispute resolution encompasses a spectrum of processes
- Look at the process as it is described to understand what to expect
- Dispute resolution processes may be distinguished by looking at two components:
 - Is the role of the mediator to be a **facilitator** or an **evaluator**?
 - Is the determination of the **outcome** **voluntary** for the participant?



ADR Spectrum



Mediation

- ▶ Looks like:
A conversation.
The participants are in the same room.
There may be several meetings over time.
- ▶ The mediator's role is **facilitative**.
- ▶ Participation in the outcome is **voluntary**.

Settlement Conference

- ▶ Looks like:
Shuttle diplomacy.
Each side of the dispute often in a separate room.
Usually lasts one day; until agreement or impasse.
- ▶ The settlement master's role is **evaluative**.
- ▶ Participation in the outcome is **voluntary**.

Arbitration

- ▶ Looks like:
An informal hearing before a tribunal.
The participants control the setting and rules but leave resolution of the dispute to the arbitrator.
- ▶ The arbitrator's role is **evaluative**.
- ▶ Participation in the outcome is **not voluntary**.



Mediation can have different purposes

- To improve the relationships between the participants. This is often referred to as the **transformative model** of mediation. This model is often used for conflicts between employees in a workplace.
- To reach an agreement by abandoning positional bargaining and bargaining by disclosing the interests in the outcome. This is often referred to as **interest-based model** of mediation.
- There are other mediation models. In practice, the nature of the dispute, the participants to the dispute, and the mediator's background and skill set determine the goals for the mediation and model used.



Mediation communications are privileged

- § 26-1-813, MCA allows the participants *and* the mediator to assert the privilege
- Mediation in criminal proceedings has a modified privilege
 - The mediator is not included as a person in the decision to waive confidentiality
 - Reporting of crimes and potential harm is expanded.
 - Exceptions to show the existence of an agreement and to interpret an agreement



The Mediator's tools

- Reframing or restating participant statements to defuse inflammatory language and objectify the dispute as a problem for mutual resolution
- Story telling by the participants to explain the dispute and the impact of the dispute from each participant's perspective
 - This can be emotional and cathartic for the participants. It is probably the most powerful tool used in mediation when the story is heard and understood by the other participant. It is sometimes necessary for a participant to tell his story before he can move to resolution of the dispute.
 - Get over your aversion to displays of emotion.



Mediator qualifications

- Anyone can hold himself out as a “mediator” in Montana
- There are no standards for training or experience in the MCA except for family law mediation
- State and national mediation organizations impose qualification and training standards



Common elements of Mediator ethical guidelines

- Maintain impartiality
- Assure that the participants understand the dispute resolution process
- Maintain confidentiality
 - Inform the participants of any exceptions
- Disclose conflicts of interest
- Assure participant determined outcome
 - Test the participant's understanding of the consequences of an agreement
- Consider unrepresented interests
- Competence to mediate the problem presented
- Disclose fees and costs in advance



Problem participants

- Antisocial and narcissistic personalities require different approaches from the mediator.
- Emotional state determines a person's ability to think cooperatively. As emotional state transitions from “fight or flight” to more sophisticated states, the ability to consider the interests of others increases.